



Republican National Lawyers Association

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TO: United States Election Assistance Commission
FROM: Republican National Lawyers Association
DATE: May 29, 2019

Thank you for the opportunity to comment on the Voluntary Voting Systems Guidelines (VVSG) 2.0 Principles and Guidelines.

The Republican National Lawyers Association (RNLA) is the home of Republican lawyers in the Republican Party. The missions of the RNLA are advancing professionalism; advancing open, fair, and honest elections; advancing career opportunities; and advancing Republican ideals. Since 1985, RNLA has worked to ensure elections are open, fair, and honest so that every eligible voter's vote is counted and ineligible votes are not counted.

The United States has the finest election system in the world and enjoys a proud position as the leading, longest lasting representative democracy in the world. Yet, there is always work to be done to improve the election system, and updating the VVSG is an important step for the Election Assistance Commission (EAC) to take to bring the certification standards for many voting systems used in America up to date with modern technological standards. The EAC should be commended for undertaking to update the VVSG quickly after a quorum of commissioners was re-established and for providing ample opportunity for public input through written comments and public hearings.

While states and localities have the primary responsibility to administer elections under our federalist system established by the Constitution, the EAC has an important role on the federal level to assist the states in administering their elections by sharing information, identifying best practices, and establishing voluntary standards. The bipartisan structure of the EAC, requiring the votes of at least three commissioners representing two of the major political parties for official agency action, is vital to its legitimacy as a federal resource to the states.

While updating the VVSG is an important goal, it is vital that the EAC not abandon these two foundational principles in the process: bipartisan control of election standards and the primary role of the states in election administration. The EAC's respect for these two principles are what gives the agency its legitimacy and what have made it a successful, trusted federal partner for election officials around the country.

Proposed VVSG 2.0 Principles and Guidelines

The proposed high-level Principles and Guidelines document¹ provides worthy goals for guidelines on voting system, but the terms used throughout the document need to be defined. The terms as currently written are vague and ambiguous and subject to differing interpretations. This may cause confusion for election officials and vendors who are seeking to create systems that meet the requirements of VVSG 2.0.

¹ U.S. Election Assistance Commission, Technical Guidelines Development Committee, Voluntary Voting System Guidelines 2.0, Principles and Guidelines [Draft], Sept. 12, 2017, *available at* https://www.eac.gov/assets/1/6/TGDC_Recommended_VVSG2.0_P_Gs.pdf.

It is important for manufacturers of voting systems to have clear Principles and Guidelines and specific corresponding Requirements together in order to be able to design systems that comply with the VVSG and obtain certification. There must be no ambiguity so manufacturers can rely on the Requirements and invest in creating or updating systems that will be compliant. Manufacturers will be unwilling to make this investment if the Principles and Guidelines or Requirements are vague, with undefined terms, as they would risk investing in a new system without the system being certified under the VVSG.

Reliability is essential to the VVSG process, including assurance for voting system vendors that there will not be sudden changes or modifications that may be costly to the design and manufacturing process and ultimately impact the purchase price. Uncertainty in the VVSG standards will be reflected in a higher price for the voting systems offered to states and localities, stressing the limited resources of election officials as they seek to invest in modern technology and update their systems.

Process for VVSG 2.0 Approval and Implementation

The Help America Vote Act of 2002 (HAVA) provides a process for the implementation of the VVSG that must be followed. VVSG 2.0 must consist of both the proposed high-level Principles and Guidelines together with the corresponding Requirements that, importantly, will also be subject to public review and comment. The Requirements, as part of the final VVSG 2.0, must have commissioner oversight and be voted on by the Commission before implementation to meet the requirements of HAVA.² The bifurcated method of consideration and adoption for the VVSG 2.0, dividing the VVSG into Principles and Guidelines and separate Requirements, does not remove the requirement for bipartisan approval by the EAC commissioners. Indeed, this approval is vital to the legitimacy of the VVSG.

The proposed Principles and Guidelines and the Requirements, once developed, cannot be considered separately or as different policies. The Requirements must be attached to the high-level Principles and Guidelines for clarity, context, and understanding and the two documents must only be considered and voted on together. Together, they are what HAVA contemplates as the Voluntary Voting Systems Guidelines, and only when paired can they provide clarity for election officials and voting system vendors on what the requirements for certification are under VVSG 2.0.

In conformity with HAVA, the Standards Board and Board of Advisors must be given an opportunity to provide input on the Principles and Guidelines together with their specific corresponding Requirements. These boards must also be given an opportunity to provide input on any subsequent modifications or updates to the Principles and Guidelines along with their specific corresponding Requirements.³ Similarly, there must be an opportunity for public comment on the Principles and Guidelines together with their specific corresponding Requirements and also on any subsequent modifications or updates to the Principles and Guidelines together with their specific corresponding Requirements.⁴

Due to the EAC lacking a quorum of commissioners for nearly a year, there have been proposals for EAC staff to approve changes or updates to the VVSG, instead of the commissioners. There are several problems with such a proposal. First, HAVA requires a vote of the commissioners prior to the final adoption of the VVSG or a modification of the VVSG.⁵ Thus, a change to the VVSG approval process would require Congress to amend HAVA; this is not a procedural change that can be made on the agency level.

² Help America Vote Act of 2002, 52 U.S.C. § 20962(d) (2019) (A voluntary voting system guideline . . . shall not be considered to be finally adopted by the Commission unless the Commission votes to approve the final adoption of the guideline (or modification), taking into consideration . . .”).

³ *Id.* § 20962(b).

⁴ *Id.* § 20962(a).

⁵ *Id.* § 20962(d).

Second, removing oversight and approval of the VVSG from the commissioners—who are suggested by congressional leaders, nominated by the President, confirmed by the Senate, and must act in a bipartisan manner—and placing it with unaccountable staff, however excellent the EAC staff may be, threatens the legitimacy of the VVSG itself. Bipartisan approval of the standards governing our elections is vital to ensuring that our election systems are open, fair, and honest both in appearance and actuality. Removing bipartisan oversight would decrease public confidence in the VVSG and reduce buy-in by the community of election officials.

If there is a lack of quorum on the EAC, changes or modifications to the VVSG, including implementation of new Requirements, must wait until a quorum of commissioners is re-established. The only exception could be a change or update made due to an update or change to an external standard referred to in the VVSG, as long as an implementation of this updated external standard in the VVSG does not materially impact the other current Requirements. Whether there is a quorum on the EAC is a political question for Congress to decide and is not the responsibility of the commissioners or EAC staff.

The EAC should not and cannot attempt to bypass the authority of Congress. The Requirements, as they correspond to the high-level Principles and Guidelines, are policy governed by the procedures in HAVA and must be kept in and under the domain of the commissioners as political appointees who act in a bipartisan manner, as outlined in HAVA.

By updating the VVSG in an open, transparent, bipartisan process, the EAC has an opportunity to improve the public's confidence in the reliability of the voting systems, the voting process, and the outcomes of elections across America. The RNLA thanks the EAC and its commissioners for undertaking this important work and for assisting state and local election officials as they administer one of our most important American institutions.

If you have any questions about this comment, please contact Michael Thielen, RNLA Executive Director, at thielen@republicanlawyer.net or 202-802-0437.